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THE REFEREE'S LIABILITY FOR CATASTROPHIC SPORTS INJURIES – A UK PERSPECTIVE

RICHARD CADDELL^{*}

I. INTRODUCTION

Like the U.S., the U.K. boasts a long tradition of popular participation in robust contact sports. A risk of injury is prevalent in activities of this type, as evidenced by the abundance of muddled, bloodied and bandaged figures dressed in team colors lining the waiting rooms of hospitals across Britain on a Saturday afternoon. While the vast majority of sports injuries are thankfully fairly minor, there are still a number of highly publicized instances of participants suffering truly catastrophic injuries that lead to long-term disability or even prove fatal.

It is often forgotten that in contact sports, the primary role of the referee is not to arbitrate over proceedings or absorb the vitriol of the spectators, but to ensure the safety of the participants through the correct and sensible application of the rules. These rules often serve the dual purpose of regulating the game while maintaining a safe environment for certain key facets of the sport, and a failure to apply these rules adequately can lead to the participants suffering serious injury. As such, the referee commands a considerable degree of trust from the participants, who are reliant on the match official to control proceedings in a manner that would maximize safety and not expose players to an unduly high risk of harm.

Litigation over injuries suffered in a sporting context is a relatively recent development in the U.K., and a number of decided cases have established a duty of care owed by participants both towards spectators to the event,¹ and to their fellow competitors.² In recent years, however, new categories of potential defendants have begun to emerge in actions for sports injuries. One important

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1. *Wooldridge v. Sumner*, [1963] 2 Q.B. 43 (Eng. C.A.); *Wilks v. Cheltenham Home Guard Motor Cycle and Light Car Club*, [1971] 1 W.L.R. 668 (Eng. C.A.).

2. *Condon v. Basi*, [1985] 1 W.L.R. 866 (Eng. C.A.). For commentary on the development of these aspects of the duty of care see Vivien Pickford, *Playing Dangerous Games*, 6 TORT L. REV. 221 (1998).

development in this regard has occurred in the U.K., where the Court of Appeal has acknowledged the responsibility a match official has with regard to safety, by formally establishing the existence of a duty of care owed by the referee to the participants. This duty of care was established following two separate cases brought by rugby players who had suffered severe spinal trauma as a result of the referee's failure to exert adequate control over a highly technical area of the game.

The purpose of this article is to analyze these decisions of the Court of Appeal and discuss their possible impact on other common law jurisdictions, as well as on the sport itself. The cases in point are important since they have already inspired similar claims of this nature in other common law countries, most notably Australia.

II. RUGBY UNION AND ITS PARTICIPANTS

One of the popular traditional descriptions of the sport of rugby union is that it is a game for hooligans played by gentlemen. Regardless of whether it is the hooligans or the gentlemen that are the incumbants on the field of play, rugby has acquired a reputation as something of a rough and ready pastime. To the outsider, rugby may appear to be a confusing riot of activity that shares elements of American football (without the protective helmets and padding) and a medieval battlefield, governed by rules that make those of cricket seem positively straightforward by comparison. Rugby union, and its sister sport rugby league, are played extensively in the U.K. at a variety of levels and age groups. In some parts of the country, such as Wales and northern England, the sport has become deeply ingrained in the local psyche, and its participants are to a considerable extent representative of the regional stereotypes.

Rugby union is played by teams of fifteen players, classified as the backs, half-backs and forwards. The backs are generally the fastest and most athletic of the players, and are largely responsible for scoring the team's points. The job of the forwards is to secure possession of the ball in a manner, which, to the untrained eye, would appear to consist of hurling themselves headlong into their opposite numbers. The half-backs are the smallest players on the field and provide a link between the forwards and the backs by passing the ball and initiating attacking maneuvers.

The forwards are collectively known as "the pack," since one of their principal duties is to form a set scrummage of eight tightly congested bodies to contest possession of the ball following an indiscretion. The scrummage is often seen as the most characteristic and distinctive element of the sport. In the formation of a scrummage, each pack aligns itself into three rows of players. The front-row consists of three players, namely the hooker (whose job is to

kick the ball back through the scrummage) who is flanked on either side by a prop. These players are usually the heaviest and most robust of the team, and the stability of the scrummage is to a considerable extent dependent upon the strength and technique of these players.

The second row consists of two further players called the locks, who are the tallest members of the side and provide a link between the various members of the pack. The pack is completed by the back-row of three players, the Number Eight and two flankers, whose job is to marshall possession of the ball as it rolls backwards through the scrummage.

When a scrummage is formed, both sets of forwards crouch and then engage heavily, aiming to exert the maximum pressure possible on the opposing pack. This means that the front-row players in particular are under considerable strain, since the brunt of the force will be exerted directly upon their necks and shoulders. If a scrummage collapses due to a mistimed engagement or substantial discrepancies in the strength and technique of the front-rows, then it is possible that these players may suffer serious injuries as a result. On the rare occasions in which such injuries occur it is usually the hooker that is the most gravely affected, since he is locked into the center of the scrummage by the props and is unable to move away from the primary impact zone. As such, it is extremely important that the referee maintains as much control as possible over the scrummage area, to ensure the stability of the maneuver and the safety of the players.

The referee's failure to marshall the scrummage area effectively can have far-reaching and tragic consequences, as evidenced by two leading cases brought in the U.K. by players who had suffered catastrophic spinal injuries in separate matches, as a result of collapsed scrummages. The first litigation of this type was the case of *Smoldon v. Whitworth*,³ brought in 1997, which established the existence of a duty of care owed by the referee to ensure the safety of the participants in a match under his control. Following *Smoldon*, this duty of care was recently developed further by the Court of Appeal in *Vowles v. Evans*.⁴

III. SMOLDON V. WHITWORTH

As with most major personal injury cases, the circumstances of *Smoldon* make for particularly bleak reading. Benjamin Smoldon was seventeen years old when he took the field for the Sutton Coldfield under-19s side against local

3. [1997] P.I.Q.R. 133.

4. [2003] 1 W.L.R. 1607. For full commentary see Richard Caddell & Ryan Morgan, *Red Card for the Welsh Rugby Union*, 2 WALES L. J. 262 (2003).

rivals Burton on October 19, 1991. Smoldon was playing in the position of hooker in a match that experienced a series of disciplinary problems at the scrummage. Eyewitness testimony paints a lurid picture of a match played with an undercurrent of deep ill-feeling among the players, and the referee was forced to intervene in a number of violent incidents, even dismissing two of the participants from the field of play for fighting. The fractious nature of the match extended to the scrummages, of which there were an unusually high number of collapses caused by the packs driving in at each other with excessive force.

In the closing stages of the match, a scrummage was awarded to Burton. The forwards failed to bind correctly and the scrummage collapsed twice. The scrummage was re-set for a third time and again the packs failed to engage cleanly. As the forwards picked themselves up off the floor, Smoldon remained immobile and it was clear that he had been seriously injured. He immediately complained of a total loss of sensation in his legs. He was taken to the hospital where it was confirmed that he had suffered major spinal trauma and is now confined to a wheelchair as a result.

Some years later, Smoldon sued for damages. At first instance, the referee, Michael Nolan (the second defendant), was held liable for the claimant's injuries.⁵ At the time at which the match was played there were a number of rules governing the formation of the scrummage, which had been implemented in order to ensure the safety of this aspect of the sport. In particular, the International Rugby Board, the body responsible for formulating the rules of rugby union, required a "crouch-touch-pause-engage" sequence to be applied by the referee at the formation of every scrummage so as to ensure as clean and as stable an engagement between the two sets of forwards as possible. The claimant alleged that the referee's failure to apply and enforce the rules of engagement at the scrummage led to an unacceptably high number of collapses of the type that eventually led to his debilitating injuries.

At the outset of litigation, the second defendant conceded that he owed a duty of care to all the participants taking the field on the fateful day in question. The Court of Appeal was therefore required to formulate the circumstances under which such a duty of care will be deemed to have been breached, and set an acceptable threshold of liability accordingly.

Lord Bingham LCJ, who gave the leading judgment in this case, observed that the situation in which an injured player had attempted to sue a match official in negligence was apparently unprecedented in the common law world. The dilemma facing the Court of Appeal in respect of the potential

5. *Smolden*, [1997] P.I.Q.R. at 133. The claim against the first defendant, an opposing front-row player, was dismissed at first instance. This decision was not challenged on appeal.

repercussions of the case were enunciated eloquently by his Lordship, who stated that:

[this] case is one of obvious importance to the plaintiff, whose capacity for active and independent life has been blighted in the flower of his youth; it is also of concern to many who fear that the judgment for the plaintiff will emasculate and enmesh in unwelcome legal toils a game which gives pleasure to millions.⁶

The case centered on the issue of the circumstances under which the referee's duty of care to the participants will be breached. Here, the second defendant argued that the Court of Appeal should formulate the threshold of liability based on the test established some years earlier in *Wooldridge v. Sumner*.⁷ This case had established the basis of the duty of care owed by the participants to spectators and had set a very high standard for breach, requiring the claimant to prove an intentional or reckless disregard for the safety of others on the part of the defendant.⁸ The referee argued that this high standard was required in order to protect match officials from frivolous litigation, and that any softening of the threshold would accordingly have a deterrent effect on the numbers of volunteers willing to officiate at matches.

This line of reasoning was rejected by the Court of Appeal, which ruled that the appropriate standard by which to determine breach should be as follows:

The level of care required is that which is appropriate in all the circumstances, and the circumstances are of crucial importance. Full account must be taken of the factual context in which a referee exercises his functions, and he could not be properly held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest. The threshold of liability is a high one. It will not easily be crossed.⁹

The Court of Appeal deemed that it was appropriate to impose liability on the referee under these circumstances, ruling that Nolan's failure to control the

6. *Id.* at 134.

7. *Wooldridge*, [1963] 2 Q.B. 43.

8. The test was formulated by Sellers LJ as follows:

If the conduct is deliberately intended to injure someone whose presence is known, or is reckless and in disregard of all safety of others so that it is a departure from the standards which might reasonably be expected in anyone pursuing the competition or game, then the performer might well be held liable for any injury his act caused.

Woolridge, [1963] 2 Q.B. at 57.

9. *Smolden*, [1997] P.I.Q.R. at 139.

scrummage effectively had amounted to a breach of his duty of care to the claimant that was sufficient to have crossed the threshold. *Smoldon* thereby established the match official as a further category of potential defendants in cases where participants in sport had suffered injury, albeit under limited circumstances.

The Court of Appeal drew a clear distinction between the match official's obligations regarding the scrummage, when he has paused the game and has taken control over the players, and during passages of fast-moving open play, in which the referee has only the bare minimum of control over the players. While the match is in progress the referee can do very little to prevent injuries arising from high-speed collisions between powerfully built players intent on winning a game, and it would be a travesty if he were to be subjected to litigation in respect of this situation. However, where the game has been paused and the match official has time to consider his options and make his safety instructions abundantly clear to the players, if it can then be shown in these circumstances that the referee was clearly negligent then it would not be so unreasonable to impose liability for injuries that occur as a result – especially given the potential scope for devastating spinal injuries to occur if the scrummage is not properly controlled.

While this decision sent palpable waves of alarm through the ranks of sports administrators and the refereeing community, it should be remembered that the threshold of liability was set at a prohibitively high level in practice, and that derelictions of this type on the part of the referee are fortunately few and far between. It would be some five years following the *Smoldon* case before the U.K. courts would be requested to consider another incident of this nature.

IV. VOWLES V. EVANS

The *Vowles* litigation also involved an incident in which a front-row forward suffered catastrophic injuries, although the circumstances differ considerably to those of *Smoldon*. Richard Vowles was a twenty-four year old professional boxer who occasionally represented his local team, Llanharan, a small town in south Wales. Following the 1995 World Cup, rugby union became a professional sport in a number of countries, including Wales. At that time, Llanharan played in the Second Division of the Welsh League, and the players representing the First XV were all semi-professional or fully professional players. Vowles played for the Second XV, which was an entirely amateur team. On January 17, 1998, Vowles was selected as a substitute front-row forward for the Second XV. A shortage of front-row cover for the First XV meant that the original hooker for the Second XV, the claimant's brother,

was requisitioned by this side, and Vowles took his place in the starting line-up.

The match against neighboring Tondur was a hard-fought and physical encounter, but one lacking the unsavory incidents that had characterized *Smoldon*. Due to the inclement weather conditions the match was dominated by the forwards and there were a large number of set scrummages, as might be expected in conditions of this type. The scrummages were contested evenly and safely until a Llanharan prop was forced from the field of play, having injured his shoulder in a tackle. This presented the Llanharan team with a dilemma, since Vowles had been their only original front-row substitute. Under these circumstances, the rules dictate that the team in question must either replace the injured player with another player who is "suitably trained/experienced,"¹⁰ or opt for non-contested scrummages, where the scrum is formed as normal but the packs are not allowed to push or contest possession of the ball. Where a team chooses to play with non-contested scrummages they must forfeit any points earned for the match.

Llanharan were keen not to lose vital league points, so one of the flankers, Christopher Jones, stepped into the breach and chose to play as prop for the remainder of the match. Jones was a powerful man who had played very occasionally in the front-row some years earlier, at a far lower standard than the match in question. Despite his best efforts, Llanharan's scrum became markedly weaker and less stable following his introduction into the front-row, and the rest of the match was littered with a series of collapsed scrummages. In the dying moments of the match Tondur attempted an attacking scrum to try to win the game. The forwards failed to engage properly yet again and Vowles collapsed as the scrum parted. He suffered a dislocation of the neck, resulting in permanent incomplete tetraplegia.

As in *Smoldon*, the *Vowles* case involved an appeal against a first instance decision to hold the referee liable for the claimant's injuries.¹¹ Vowles alleged that the referee had failed to discharge his duty of care adequately by failing to take preventative action to restore the stability of the scrum. Under Law 3(12), when a player professes an ability to play out of position in the front-row, the referee is obliged to make inquiries of both the proposed replacement

10. INTERNATIONAL RUGBY BOARD, Law 3(12), at <http://www.irb.com/NR/rdonlyres/A1F47EAA-EBD7-43F9-BD4F-64DC7368A6C2/0/Law3.pdf> (last visited Mar. 8, 2005). In practice many back-row forwards have played at some point in their careers as a front-row forward, and vice-versa, thus most sides will often have at least one flanker with a commensurate level of expertise and training in front-row play when situations such as this arise.

11. *Vowles*, [2003] 1 W.L.R. at 1607. The Welsh Rugby Union, the sport's governing body in Wales, had been held vicariously liable for the match official's negligent refereeing.

and the team captain, as to that player's suitability for this position.¹² David Evans, the match official, had failed to make such inquiries of either Jones or the captain (who in any event was a half-back with no knowledge of front-row play), content with Jones's rather non-committal offer of, "I'll give it a go."

The claimant argued that, although it was not unreasonable *per se* to have allowed Jones a brief trial period in this position, a reasonable referee would have concluded swiftly that he was a player that was unsuitable for the rigors of front-row play and would accordingly have asserted his authority by demanding that the remainder of the match would be played with non-contested scrummages. In fact, Evans allowed Jones to continue in this position for nearly an hour, despite the scrum collapsing at almost every attempt. This failure by the referee to acknowledge that Jones was clearly out of his depth, and to act accordingly to ensure the safety of the players at the scrum, was alleged by the claimant to amount to a breach of the duty of care of sufficient gravity to cross the threshold of liability.

Despite the apparent similarities in the two cases, there were a number of key differences between the two claims. Firstly, in *Smoldon* the existence of a duty of care had been conceded at the outset of litigation by the referee, whereas in *Vowles* the defendants disputed the existence of such a duty. Secondly, *Smoldon* involved a claimant who had been a minor at the time of the accident, while *Vowles* concerned a team of adult players. As such, it was argued that the decision in *Smoldon* could be distinguished from *Vowles* since it involved a greater standard of care required by those who undertake to safeguard the welfare of children.

The Court of Appeal upheld the first instance finding of liability, and categorically rejected the arguments of the defendants. Lord Phillips MR, who gave the leading judgment, resolved once and for all that a match official owes a duty of care to the players, irrespective of whether the match is played by adults or minors, amateurs or professionals:

Rugby football is an inherently dangerous sport. Some of the rules are specifically designed to minimise the inherent dangers. Players are dependant for their safety on the due enforcement of the rules. The role of the referee is to enforce the rules. Where a referee undertakes to perform that role, it seems to us manifestly fair, just and reasonable that the players should be entitled to rely upon the referee to exercise reasonable care in so doing. Rarely if ever does the law absolve from any obligation of care a person whose acts or omissions are manifestly capable of causing physical harm to others in a structured relationship into which they have entered. . . .

12. INTERNATIONAL RUGBY BOARD, *supra*, note 10.

A referee of a game of rugby football owes a duty of care to the players.¹³

The Court of Appeal ruled that the conduct of Evans had fallen below that expected of a reasonable referee by failing to take the necessary action to protect the safety of the players at the scrummage, by allowing Jones to continue in his capacity as a makeshift prop. This omission amounted to a breach of the duty of care and accordingly the defendants were held liable. Despite this finding, Lord Phillips MR reiterated the sentiments of *Smoldon* in that a referee would not be held liable for errors of judgment, oversights or lapses that occur during the context of a fast-moving game, and that "[t]he threshold of liability must properly be a high one."¹⁴

The decision in *Vowles* does not mark any radical departure from the previous judgment in *Smoldon*, although it has clarified the position of the referee under U.K. law to a considerable extent. Following the *Vowles* decision, it is clear that a referee owes a duty of care to the participants to properly enforce the rules of safety, especially where the game has been paused. If it can then be shown that the referee has failed to do so and a participant suffers harm as a result, then the injured player may bring an action in negligence against the match official.

While *Smoldon* and *Vowles* related to the scrummage area, regarding the application of a body of highly technical rules for a unique aspect of the sport, the "open play" distinction drawn by the Court of Appeal may not necessarily preclude actions against the referee in cases where injuries have been sustained during a free-flowing passage of play. For instance, in sports such as soccer, a number of players suffer serious leg injuries every year due to badly-timed and even malicious tackles. The same is true of other sports such as hockey, where a dangerous use of the stick can result in grave facial injuries.

Following these cases it is tenable to suggest that, if a particular match is played with a simmering undercurrent of violence between the teams, and the referee fails to take action to assert his authority to prevent a series of unsavory incidents, if a player is injured as a result, he might possibly bring an action both against the player responsible, as well as against the match official for failing to exert adequate control over proceedings in a manner analogous to the situations in *Smoldon* and *Vowles*. Whether such a proposition makes the leap from the realms of theoretical possibility to litigative reality will depend upon the individual facts of the incident in question, not least the degree of the referee's abdication of responsibility, but should make for an interesting test

13. *Vowles*, [2003] 1 W.L.R. at 1617-18.

14. *Id.* at 1618.

case.

At present, litigation against referees is pending in Australia, where the popularity of rugby union and a large player base has resulted in a number of participants suffering similar injuries to the claimants in the two cases in point. It is reasonable to suggest that *Smoldon* and *Vowles* can be successfully exported to Australia, especially given the extensive cross-pollination of tortious principles between these two jurisdictions in the past. It has not been possible to ascertain whether any such litigation is pending in other common law countries such as New Zealand, Canada or the US, but the UK approach could serve as an effective and persuasive guide to framing future actions of this type.

V. CONCLUDING REMARKS

The decisions in *Smoldon* and *Vowles* were greeted with a predictable fanfare of opprobrium by the various regulatory unions and referee's societies, anxious that the successful actions by the claimants would open the floodgates to claims of this nature against match officials. Despite the blaze of publicity created in the UK by both cases, it is unlikely that they will provoke any great avalanche of litigation and actions of this type will continue to be rare in practice. Catastrophic injuries are not common, even in high-intensity contact sports, and instances in which such injuries are facilitated by a lack of vigilance on the part of the match official will be rarer still. Although the Court of Appeal has established a duty of care on the referee, the test for breach of this duty has been sufficiently well formulated to discourage frivolous litigation, and claims for injuries sustained in circumstances over which it is near impossible for even the most diligent referee to have exercised any degree of preventative control will rightly be rejected.

It is a sad day indeed when an athlete is cut down in his prime pursuing an activity he loves, but it would be blacker still for a sport to be held hostage by the constant and pervasive threat of litigation. In this regard, the approach of the Court of Appeal is to be welcomed, since Lord Bingham's objective has been achieved in compensating the claimants for their debilitating injuries, while relegating the presence of litigation firmly to the sidelines of the sport in all but the most deserving of cases. Such an "arm's length" approach to liability should not pose any major disincentive for volunteers to come forward to act as match officials, while ensuring that dangerously substandard refereeing will attract the appropriate civil sanctions, given the serious injuries that may occur as a result. To this extent, the decisions in *Smoldon* and *Vowles* are to be welcomed, and represent an admirable model for similar jurisdictions to follow.